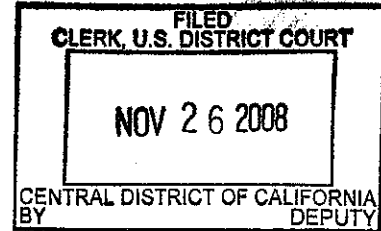


1 WHATLEY DRAKE & KALLAS, LLC
Edith M. Kallas, Esq.
2 ekallas@wdklaw.com (admitted pro hac vice)
Joseph P. Guglielmo
3 jguglielmo@wdklaw.com (admitted pro hac vice)
1540 Broadway, 37th Floor
4 New York, NY 10036
Tel: (212) 447-7070
5 Fax: (212) 447-7077

6 ROSNER & MANSFIELD, LLP
Alan M. Mansfield, Esq. (SBN: 125998)
7 alan@rosnerandmansfield.com
10085 Carroll Canyon Road, Suite 100
8 San Diego, CA 92131
Tel: (858) 348-1005
9 Fax: (858) 348-1150



10 Attorneys for Plaintiffs

11 [Additional Counsel Appear on Signature Page]

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **WESTERN DIVISION**

15 CRESCENCIO GALVEZ, CARMEN
ACUNA, and GUADALUPE
16 GALVEZ, individually and on behalf
of all others similarly situated,

17 Plaintiffs,

18 v.

19 TOUCH-TEL U.S.A., L.P. dba
20 TOUCH-TEL USA, LLC,

21 Defendant.

CASE NO. 2:08-CV-05642-RGK-JC

CLASS ACTION

**FIRST AMENDED COMPLAINT
(CLASS ACTION) FOR:**

- 1) VIOLATION OF §§ 17500 OF
THE CALIFORNIA BUS. &
PROF. CODE;
- 2) VIOLATION OF §§ 17200 OF
THE CALIFORNIA BUS. &
PROF. CODE;
- 3) BREACH OF CONTRACT;
- 4) MONEY HAD AND
RECEIVED, AND UNJUST
ENRICHMENT;
- 5) DECLARATORY RELIEF;
- 6) VIOLATION OF § 17538.9 OF
THE CALIFORNIA BUS. &
PROF. CODE;
- 7) VIOLATION OF THE
CONSUMERS LEGAL
REMEDIES ACT, CAL. CIV.
CODE §1750 ET SEQ.

DEMAND FOR JURY TRIAL

1 Plaintiffs Crescencio Galvez, Carmen Acuna, and Guadalupe Galvez
2 (collectively "Plaintiffs"), by and through their attorneys, bring this action against
3 defendant Touch-Tel U.S.A., L.P. ("Touch-Tel" or "Defendant"), on behalf of
4 themselves and a class of consumers (the "Class") who purchased pre-paid
5 telephone cards that were produced, sold, administered, distributed, or otherwise
6 offered to the public by Defendant between August 27, 2004 and the present (the
7 "Class Period"). Plaintiffs allege the following upon their own personal knowledge
8 and with evidentiary support where specifically so identified, or where there is no
9 personal knowledge, upon information and belief and investigation of counsel
10 formed after an inquiry reasonable under the circumstances, which allegations will
11 likely have evidentiary support after a reasonable opportunity for further
12 investigation or discovery:

13 NATURE OF THE ACTION

14 1. In direct contravention of California law that specifically details the
15 standards for advertising such products, Defendant systematically misleads
16 consumers who purchase and use pre-paid, non-rechargeable telephone cards ("pre-
17 paid calling cards") offered by Defendant, by misrepresenting the number of
18 minutes of international and long distance telephone service the cards provide
19 and/or concealing that various fees charged when consumers use the cards further
20 reduce the number of minutes available.

21 2. Plaintiffs bring this nationwide class action as a result of Defendant's
22 systematic scheme to deceive consumers who purchase and use pre-paid calling
23 cards. In violation of state statutory laws prohibiting unfair and deceptive business
24 practices, as well as in breach of their contracts with consumers, Defendant
25 perpetrates its scheme through a variety of deceptive means, as described herein.

26 3. Defendant sells pre-paid calling cards to consumers throughout the
27 United States. These cards allegedly enable consumers to make international and
28 long distance calls at relatively low cost as compared to other sources of

1 international telephone service. Accordingly, many low-income individuals and
2 immigrants purchase and use them to make telephone calls to their home countries.
3 Indeed, in excess of \$2 billion worth of pre-paid calling cards are sold in the United
4 States each year.

5 4. Defendant perpetrates its fraud through various means, including, *inter*
6 *alia*, misrepresenting the number of minutes of telephone service that a consumer
7 will get from a pre-paid calling card; misrepresenting the amount of telephone
8 connection time actually remaining on a pre-paid calling card when a consumer is
9 using the card; concealing when connection fees apply; employing misleading
10 marketing techniques that make it virtually impossible for consumers to compare
11 the rates and costs of using different pre-paid calling cards; misrepresenting the
12 expiration dates on pre-paid calling cards; unfairly preventing customers from
13 utilizing balances remaining on pre-paid calling cards when such balances are less
14 than the cost of a phone call including connection fees; and failing to adequately
15 disclose that Defendant charges more for calls involving wireless phones.

16 5. Defendant uniformly advertises its pre-paid calling cards as providing
17 a certain number of minutes of telephone calling time to a specific destination – for
18 example, a \$5.00 card might be advertised as providing 150 minutes of calling time
19 from a certain location to Mexico. The representations of the number of minutes a
20 given pre-paid calling card will provide to a given location are printed on
21 Defendant's advertising posters, the packaging of the pre-paid calling cards, and on
22 the cards themselves. However, as a result of Defendant's deceptive practices,
23 consumers consistently receive fewer calling card minutes than promised.

24 6. Consumers are also given automated voice prompts each time they
25 make a call with a pre-paid calling card. These prompts purport to inform
26 consumers how many minutes they have for the call, and consumers reasonably rely
27 on those voice prompts, along with Defendant's advertising, to confirm the number
28 of minutes they have purchased and how much time they have left on their pre-paid

1 calling cards after the initial use. However, as described more fully below,
2 Defendant's computer systems are pre-programmed to misrepresent the number of
3 minutes left on pre-paid calling cards. Thus, consumers are unable to know, at any
4 given time, how much time they have remaining on their pre-paid calling cards.

5 7. When consumers use their pre-paid calling cards, Defendant charges
6 them a variety of undisclosed fees and other charges that are deducted from the
7 value remaining on the card, thereby further reducing the number of telephone
8 service minutes that a consumer will be able to use.

9 8. Defendant does not inform consumers when such charges are imposed;
10 it simply deducts the amount from the value of the card. Through these and other
11 deceptive practices, Defendant cheats users of its pre-paid calling cards out of
12 millions of dollars each year.

13 PARTIES

14 Plaintiffs

15 9. On personal knowledge, Plaintiff Crescencio Galvez resides in Los
16 Angeles, California.

17 10. On personal knowledge, during the Class Period, specifically during
18 the Summer of 2007, Mr. Galvez purchased a Touch-Tel U.S.A. pre-paid calling
19 card at Big Bear Liquor Market, 2606 E. First Street, Los Angeles, California, for
20 \$5.00. Mr. Galvez bought the card as a result of the written representation that the
21 card would provide 142 minutes of call time to Mexico from Los Angeles. Such
22 representation was printed on Touch-Tel's advertisements posted at the point-of-
23 sale. When he used his pre-paid calling card for the first time, a computerized
24 voice prompt confirmed over the telephone that he had 142 minutes of calling time
25 to Mexico from Los Angeles. However, contrary to these representations, Mr.
26 Galvez only received approximately 100 minutes of call time – or only
27 approximately 70% of the minutes advertised and represented by Defendant. Mr.
28 Galvez thus lost money or property as a result of Defendant's business practices.

1 11. On personal knowledge, Plaintiff Carmen Acuna resides in Los
2 Angeles, California.

3 12. On personal knowledge, during the Class Period, specifically, in
4 Summer of 2007, Ms. Acuna purchased a Touch-Tel U.S.A. pre-paid calling card at
5 a liquor store at 2901 E. First Street, Los Angeles, California, for \$5.00. Ms. Acuna
6 bought the card as a result of the written representation that the card would provide
7 142 minutes of call time to Mexico from Los Angeles. Such representation was
8 printed on Touch-Tel's advertisements posted at the point-of-sale. When she used
9 her calling card for the first time, a computerized voice prompt confirmed over the
10 telephone that she had 142 minutes of calling time to Mexico from Los Angeles.
11 However, contrary to these representations, Ms. Acuna only received
12 approximately 90 minutes of call time – or only approximately 63% of the minutes
13 advertised and represented by Defendant. Ms. Acuna thus lost money or property
14 as a result of Defendant's business practices.

15 13. On personal knowledge, Plaintiff Guadalupe Galvez resides in Los
16 Angeles, California.

17 14. On personal knowledge, during the Class Period, specifically, in the
18 Summer of 2007, Ms. Galvez purchased a Touch-Tel U.S.A. pre-paid calling card
19 at Stephanie Market, 2961 Fourth Street, Los Angeles, California, for \$5.00.
20 Ms. Galvez bought the card as a result of the written representation that the card
21 would provide 142 minutes of call time to Mexico from Los Angeles. Such
22 representation was printed on Touch-Tel's advertisements posted at the point-of-
23 sale. When she used her calling card for the first time, a computerized voice
24 prompt confirmed over the telephone that she had 142 minutes of calling time to
25 Mexico from Los Angeles. However, contrary to these representations, Ms. Galvez
26 only received approximately 85 minutes of call time – or only approximately 60%
27 of the minutes advertised and represented by Defendant. Ms. Galvez thus lost
28 money or property as a result of Defendant's business practices.

Defendant

15. Defendant Touch-Tel U.S.A., L.P. is a Texas corporation registered to do business in the State of California, with its address at 5444 Westheimer, Suite 1535 Houston, Texas 77056 and its agent for service of process located in Santa Fe Springs, California.

16. Touch-Tel is in the business of servicing, manufacturing and/or distributing pre-paid calling cards throughout the nation, and further creates, disseminates and distributes advertising in conjunction therewith. It operates in five major California markets – more than any other state – and specifically claims to focus its advertising on the Latino market.

17. On personal knowledge, Touch-Tel's website states that it is the "fastest growing phone card company in the USA and its flagship product, 'TELECENAVOS®' is the number one selling single phone card in the country." It also boasts: "Our distribution channel has presence in Alabama, Arizona, California, Colorado, Delaware, Georgia, Florida, Illinois, Maryland, New Jersey, New Mexico, New York, North and South Carolina, Oklahoma, Tennessee, Texas, Nevada, Virginia and Wisconsin." See <http://www.touch-tel.com> (last accessed on November 19, 2008).

18. None of these pre-paid calling cards are regulated by a government agency that would preclude the Court from providing full and complete relief to members of the Class, nor is Defendant required to make any tariff filing. However, Plaintiffs do not seek to change, diminish, or modify the rates and fees being charged by Defendant pursuant to filings with any governmental regulatory agency, to the extent such filings were previously required or may be required in a particular state.

JURISDICTION AND VENUE

19. This Court has jurisdiction over this action pursuant to the Class Action Fairness Act, 28 U.S.C. §1332 (2005), as there are more than 100 class

1 members who are located both within and outside the State of California, and
2 Plaintiffs allege that the damages suffered and sought to be recovered herein total,
3 in the aggregate, more than \$5,000,000. This Court has original jurisdiction over
4 this action under 28 U.S.C. §§ 1331, 1338 and 1367.

5 20. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because a
6 substantial part of the events giving rise to the claims asserted herein occurred in
7 this District.

8 FACTS

9 Background

10 21. In the telephone service industry, pre-paid calling cards are
11 commonplace and are primarily used to make long distance and international phone
12 calls. By definition, a pre-paid calling card is a card through which a customer
13 obtains telephone service that is paid for in advance. Such cards are primarily
14 targeted and marketed to immigrants and individuals who generally do not speak
15 and read English as their primary language.

16 22. Pre-paid calling cards are sold in retail outfits such as convenience
17 stores, and are heavily promoted in immigrant communities as an affordable option
18 for people who need to make calls overseas but lack the means to obtain a cellular
19 telephone or regular long-distance and international telephone service.

20 23. Pre-paid calling cards, including those offered by Defendant, are
21 available in various dollar amounts, ranging from \$2.00 to \$100.00 per card, and
22 are sold with accompanying, uniform representations, printed on the cards
23 themselves, on point-of-sale posters, and/or on the packaging of the cards,
24 indicating how many minutes of calling time to a specific location are available on
25 the cards.

26 24. Most pre-paid calling cards are disposable, meaning that when the
27 amount of calling card minutes on the card is exhausted, the card is thrown away
28 rather than having additional dollars added to it.

1 25. The purchaser of a calling card actually buys access to increments of
2 long distance telephone access via a fully automated computer system, commonly
3 referred to in the industry as a "platform." The platform processes various relevant
4 data points, including the value of the pre-paid calling card, the telephone rate table
5 in effect, the origin of the call and the destination of the call, and keeps records of
6 that information, allowing the company to determine, and then inform the
7 consumer, as to the amount of time he or she has for the call.

8 26. A personal identification number (PIN) and local telephone numbers to
9 call for access are commonly printed on pre-paid calling cards. Calls are made by
10 calling the access number and, upon being prompted, entering the PIN listed on the
11 card.

12 27. The PIN is used by the Defendant to keep records of how much time is
13 left on the card.

14 28. After the platform verifies the PIN, the consumer is then granted
15 access to the long distance services he or she has purchased. The consumer is
16 subsequently prompted by the platform to enter the destination telephone number
17 he or she wishes to be connected with.

18 29. After the consumer enters the destination number, an automated voice
19 prompt states the number of minutes available for the call, *e.g.*: "You have 42
20 minutes for this call." This voice prompt is generated by the platform.

21 30. Once the consumer has exhausted the increments of long distance
22 telephone services purchased, the PIN ceases to provide access to such
23 telecommunications services.

24 31. Pre-paid calling cards are popular among people who desire low cost
25 telecommunication services, such as recent immigrants and other persons having
26 long distance and international calling needs and budgetary concerns. For example,
27 persons having recently immigrated to the United States may need to communicate
28 frequently with family back in their home country, but may not have the means by

1 which to obtain or pay for long-distance service through conventional telephone
2 service arrangements. Because these groups of people tend to be heavy users of
3 international long distance, Defendant actively targets the marketing of its pre-paid
4 calling cards to them, among others. Such persons are particularly susceptible to
5 misleading advertising due to their limited English speaking and reading abilities.
6 Some of the most frequent destination countries for immigrants using pre-paid
7 calling cards to communicate with their loved ones overseas are locations such as
8 the Dominican Republic, Guatemala, Mexico, El Salvador, Colombia, Nicaragua,
9 Ecuador, Haiti, Honduras and Peru.

10 **Defendant's Practices**

11 32. Defendant creates, disseminates and distributes advertising to promote
12 the sale of its pre-paid calling cards, listing specific amounts of minutes available
13 depending on the value of the pre-paid calling card. Defendant's uniform
14 advertising consists of point of purchase posters, website advertising, packaging
15 and voice prompts, all of which advertising uniformly communicates to consumers
16 that they will receive certain numbers of minutes to a given location for a certain
17 cost.

18 33. As detailed below, contrary to such representations, and in
19 contravention of California law regulating such advertising, Defendant's cards do
20 not provide the minutes advertised to consumers on the face of the cards and on
21 their posters, packaging and voice prompts, nor do they properly disclose the
22 substantial surcharges imposed on the use of such cards.

23 34. Defendant also does not disclose to consumers at any time during the
24 transactions at issue that the cards in question do not deliver the number of minutes
25 promised.

26 35. As a result of Defendant's wrongful practices as described herein, the
27 minutes actually delivered to consumers by Defendant are materially less than those

28 ///

1 represented in the advertising at issue, resulting in a loss of money or property to
2 Plaintiffs and the Class members.

3 36. Contrary to California law, and specifically Cal. Business &
4 Professions Code §17538.9, Defendant secretly applies connection fees and other
5 charges without adequately informing consumers that such fees and charges are
6 being applied and are used to deduct from the actual value of the pre-paid calling
7 card. The face of Defendant's pre-paid calling cards and printed advertisements
8 represent that there are "no connection fees" or that "connection fees *may* apply"
9 (emphasis added), even though connection fees *will* apply in almost every instance.
10 Defendant does not say how much these fees might be at any time during the entire
11 transaction. These fees are material because a connection fee may consume as
12 much as 40% of the value of a pre-paid calling card.

13 37. Defendant also imposes charges, such as bi-weekly service charges,
14 that are automatically deducted from the value of a card, without adequately
15 informing consumers of this deduction or its amount.

16 38. Defendant also advertises low per-minute costs in order to convince
17 consumers that the overall cost of each call is low, when in fact the per-minute cost
18 of calls is materially higher when connection fees and other charges are factored in.
19 Defendant does not adequately disclose this material fact to consumers, if at all, at
20 any time during the entire consumer transaction.

21 39. Defendant also represents that it provides a "toll-free" access number.
22 This representation is false, because customers using the "toll-free" number are
23 charged a higher per-minute rate than those who use local access numbers.

24 40. Defendant also misrepresents and actively conceals that it charges
25 consumers more for calls using wireless telephones than those on land line
26 telephones. All of these practices result in consumers paying more and receiving
27 less in terms of telephone talk time than represented by Defendant.

28 ///

1 41. Touch-Tel's conduct described herein has come under the scrutiny of
2 state attorneys general. For example, Florida Attorney General Bill McCollum
3 recently announced that, pursuant to an investigation that was launched by the
4 Attorney General's Economic Crimes Division after the Office of the Attorney
5 General received more than 200 complaints about the industry's practices, he had
6 reached a settlement with Touch-Tel concerning its pre-paid calling cards in
7 Florida. Consumers had complained that Touch-Tel and other companies were
8 improperly using hidden and inadequately disclosed fees to cheat consumers, as
9 described herein. A news release issued by the Attorney General's office stated that
10 "Touch-Tel also allegedly offered 'unlimited' minutes which were not truly
11 unlimited and made generic mention of additional fees and surcharges rather than
12 specifically stating the actual amount of each fee or surcharge." Source: Attorney
13 General Bill McCollum News Release – Prepaid Calling Card Company Reaches
14 Settlement with Attorney General, July 2, 2008, available at
15 [http://myfloridalegal.com/newsrel.nsf/newsreleases/1439BD5308D470588525747](http://myfloridalegal.com/newsrel.nsf/newsreleases/1439BD5308D470588525747A006423B8)
16 [A006423B8](http://myfloridalegal.com/newsrel.nsf/newsreleases/1439BD5308D470588525747A006423B8) (last accessed on November 20, 2008).

17 42. The news release went on: "Investigators determined there were also
18 allegations that Touch-Tel was rounding up completed call times to the nearest
19 three-minute increment. Additionally, at least one advertising poster seized by the
20 Economic Crimes Division contained fees and surcharges disclaimer printed in
21 English only, even though the rest of the poster was printed in Spanish. Other
22 problems included a statement that a 25 percent service fee would apply to each call
23 and a general statement on numerous posters that stated surcharges would apply.
24 These terms were non-specific as to actual charges that consumers would be
25 required to pay." *Id.*

26 43. Pursuant to Touch-Tel's settlement with the Florida Attorney General,
27 Touch-Tel "must cease all deceptive advertising, provide 100 percent of the
28 minutes advertised, and submit to three years of auditing by the Office of the

1 Attorney General to ensure that it is following the terms of the agreement. The
 2 company will also reimburse the Attorney General's Office \$125,000 for the cost of
 3 its investigation and future enforcement efforts." *Id.*

4 44. Additionally, Touch-tel "must agree to print disclosures in any
 5 language used in the advertisements. There must be a clear representation of the
 6 exact number of minutes available on each card and the card's expiration dates, if
 7 applicable, must be clearly provided. There must also be no surcharges resembling
 8 taxes and calls must only be rounded up to the nearest one-minute increment. All
 9 additional limitations or terms of use must be clearly provided." *Id.*

10 45. While the settlement with the Florida Attorney General requires
 11 Touch-Tel to correct its conduct in Florida, it does not alter Touch-Tel's conduct in
 12 other states, nor does it provide compensation for the thousands of consumers who
 13 have purchased Touch-Tel's pre-paid calling cards throughout the United States
 14 and have been injured in the manner described herein.

15 **The Conduct at Issue is Focused on California**

16 46. Much of the conduct at issue arises in California. Specifically,
 17 Defendant's activities were specifically targeted to consumers in California and the
 18 sale, advertising and marketing of the pre-paid calling cards occurred in California.
 19 Touch-Tel specifically claims to focus its advertising on the Latino market,
 20 asserting on its website "a pre-paid calling card is a basic product in a Hispanic's
 21 grocery list". Discovery may further establish that such conduct emanates from
 22 California to other states due to Touch-Tel's substantial presence in California.

23 **CLASS ACTION ALLEGATIONS**

24 47. Plaintiffs bring this action on their own behalf and as a class action
 25 pursuant to Rules 23(b)(2) and 23 (b)(3) of the Federal Rules of Civil Procedure on
 26 behalf of the following proposed class:

27 ///

28 ///

1 All persons who purchased between August 27, 2004 to the present
 2 (the "Class Period") pre-paid calling cards that were produced, sold,
 3 administered, distributed, or otherwise offered to the public by
 4 Defendant (the "Class").

5 48. Upon completion of discovery with respect to the scope of the Class or
 6 Class, Plaintiffs reserve the right to amend the Class Period and/or the Class
 7 definition.

8 49. Excluded from the Class are Defendant, its parents, subsidiaries and
 9 affiliates, its directors and officers and members of its immediate families, the
 10 Court, the Court's spouse, all persons within the third degree of relationship to the
 11 Court and its spouse, and the spouses of all such persons.

12 **Numerosity:**

13 50. The members of the Class are so numerous and geographically diverse
 14 that joinder of all of them is impracticable. While the exact number and identities
 15 of members of the Class are unknown to Plaintiffs at this time and can only be
 16 ascertained through appropriate discovery, based on Defendant's representations
 17 and the scope of its advertising, there are thousands of Class members throughout
 18 the United States.

19 **Commonality:**

20 51. There are questions of fact and law common to the members of the
 21 Class, which predominate over any individual questions of law or fact, including
 22 but not limited to the following:

- 23 • Whether Defendant has systematically provided false, untrue or
 24 misleading information in connection with the sale of its pre-paid
 25 calling cards, including, but not limited to, the amount of telephone
 26 service time available on the cards and the existence and extent of
 27 charges associated with the use of the pre-paid calling cards;

28 ///

- Whether Defendant has systematically failed to adequately disclose material information on its pre-paid calling cards that is required to be disclosed under California law, including, but not limited to, all charges associated with the use of the cards;
- Whether Defendant has violated relevant state consumer laws through its wrongful practices;
- Whether Defendant has breached its contracts with Plaintiffs and the Class through its wrongful practices;
- Whether Defendant has been unjustly enriched through its wrongful practices;
- Whether Plaintiffs and the members of the Class have sustained damages or injuries by reason of Defendant's wrongful practices, and if so, the proper measure of such damages or injuries;
- Whether Plaintiffs and members of the Class are entitled to injunctive and/or other equitable relief; and
- Whether Plaintiffs and the members of the Class are entitled to declaratory relief.

Typicality:

52. Plaintiffs' claims are typical of the claims of the other members of the Class, in that Plaintiffs aver a common course of conduct by Defendant towards themselves and members of the Class. Plaintiffs, like other members of the Class, purchased pre-paid calling cards and did not receive the full value represented by Defendant, and suffered damages and/or lost money or property as a result of Defendant's wrongful practices as detailed above.

Adequacy:

53. Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs' claims are coextensive with, and not antagonistic to, the claims of the other members of the Class. Plaintiffs are willing and able to vigorously prosecute

1 this action on behalf of the Class, and Plaintiffs have retained competent and
2 experienced counsel who satisfy the requirements of Rule 23(g).

3 54. Plaintiffs bring this action under Rule 23(b)(3) because common
4 questions of law and fact predominate over issues that are individual to members of
5 the Class. In addition, the expense of litigating each Class members' claims
6 individually would be so cost prohibitive as to deny Class members a viable
7 remedy. Certification under Rule 23(b)(3) is appropriate because a class action is
8 superior to the other available methods for the fair and efficient adjudication of this
9 action on either an individual or a group-wide basis, and Plaintiffs envision no
10 unusual difficulty in the management of this action as a class action as Defendant
11 would or should retain records of the amount of deductions and overcharges made
12 on Class members' calling cards. Notice of the pendency of this action and any
13 resolution thereof can be accomplished by a combination of publication and direct
14 notice to those Class members whose names and addresses are on file with
15 Defendant.

16 55. Plaintiffs also bring this action under Rule 23(b)(2), because
17 Defendant has acted or refused to act on grounds generally applicable to all
18 members of the Class, thereby making final injunctive relief concerning the Class
19 as a whole appropriate. In the absence of appropriate injunctive relief, Defendant
20 will continue to operate its systematic scheme. Defendant's uniform conduct
21 towards Plaintiffs and other members of the Class makes certification under Rule
22 23(b)(2) appropriate.

23 COUNT I

24 *False or Misleading Advertising Under §17500 of the California* 25 *Business & Professions Code*

26 56. Plaintiffs repeat and re-allege the allegations set forth in the above
27 paragraphs as if fully set forth herein.

28 ///

1 57. Defendant has caused to be disseminated, either in or from this State,
 2 untrue or misleading factual statements in advertising, as set forth above,
 3 concerning its pre-paid calling card businesses, in violation of §17500, *et seq.* of the
 4 California Business & Professions Code, and the restrictions set forth in §17358.9.

5 58. Defendant's untrue and misleading advertising described herein is
 6 likely to mislead consumers with respect to the number of minutes they actually
 7 receive for the price they pay.

8 59. Defendant's acts and practices described herein were intended to
 9 induce Class members to enter into transactions to purchase these pre-paid calling
 10 cards and/or to continue to use such calling cards, and have caused deception of the
 11 public, misleading reasonable consumers targeted by such advertising as to the true
 12 characteristics of Defendant's products. If it had exercised reasonable care,
 13 Defendant should have known such statements were untrue or misleading, or made
 14 such statements as part of a scheme with the plan not to sell such services as
 15 advertised.

16 60. As a result of Defendant's acts and practices as alleged above,
 17 Plaintiffs and members of the Class have been injured in fact and have lost money
 18 or property. They are thus entitled to the remedies available under the Unfair
 19 Competition Law, including restitution and disgorgement, appropriate preliminary
 20 and permanent injunctive relief and imposition of a constructive trust, and such
 21 other and further relief as the Court may deem proper.

22 **COUNT II**

23 **Unlawful, Fraudulent and Unfair Business Practices Under § 17200 of the** 24 **California Business & Professions Code**

25 61. Plaintiffs repeat and re-allege the allegations set forth in the above
 26 paragraphs as if fully set forth herein.

27 62. Defendant has engaged in unlawful business acts and practices, as set
 28 forth in detail above, in connection with its pre-paid calling card business by

1 engaging in conduct in violation of Sections 17200, *et seq.* and 17500, *et seq.*,
 2 including Section 17538.9, of the California Business & Professions Code,
 3 California Civil Code §1750, *et seq.*, and the other laws identified herein. Plaintiffs
 4 reserve the right to identify additional violations of laws as circumstances warrant.

5 63. Defendant's conduct is likely to mislead consumers with respect to the
 6 number of minutes they receive for the price they pay, resulting in its engaging in
 7 fraudulent business acts and practices.

8 64. Defendant's acts and practices described herein have caused deception
 9 of the public, misleading prospective purchasers and targeted consumers as to the
 10 true characteristics and qualities of Defendant's products. The gravity of such
 11 conduct outweighs any justification therefor. The prohibition of such conduct is
 12 tethered to a legislative policy as set forth in Section 17358.9. Defendant has thus
 13 engaged in an unfair business act or practice.

14 65. As a result of Defendant's conduct as alleged above, Plaintiffs and
 15 members of the Class have been injured in fact and have lost money or property.
 16 They are thus entitled to the remedies available under the Unfair Competition Law,
 17 including restitution and disgorgement, appropriate preliminary and permanent
 18 injunctive relief and imposition of a constructive trust, and such other and further
 19 relief as the Court may deem proper.

20 **COUNT III**

21 **Breach of Contract**

22 66. Plaintiffs repeat and re-allege the allegations set forth in the above
 23 paragraphs as if fully set forth herein.

24 67. Defendant sold pre-paid calling cards to Plaintiffs and the members of
 25 the Class pursuant to the terms and conditions set forth on the face of the cards and
 26 in Defendant's advertising.

27 68. The point-of-sale representations of the costs of using the cards and the
 28 number of calling minutes provided constitute a legally binding offer, and

1 Plaintiffs' and Class members' acceptance of those terms by the use of such cards
 2 constitutes a legally binding acceptance, pursuant to valid consideration paid.
 3 Accordingly, legally binding contracts were created between Defendant and
 4 Plaintiffs and Class members who bought the pre-paid calling cards at issue.

5 69. Defendant breached its contracts with Plaintiffs and Class members
 6 through the conduct described above.

7 70. As a result of Defendant's breach of contract, the actual per-minute
 8 cost of calls made using its pre-paid calling cards was much higher than the
 9 contractually-agreed to price because of additional material charges and methods of
 10 computation that were not properly disclosed.

11 71. As a result of Defendant's breach of contract, Plaintiffs and members
 12 of the Class have been damaged in an amount to be determined at trial, and are
 13 entitled to compensatory damages plus interest, costs, and other such additional
 14 monetary or equitable relief as is deemed proper by the Court.

15 COUNT IV

16 *Money Had and Received and Unjust Enrichment*

17 72. Plaintiffs repeat and re-allege the allegations set forth in the above
 18 paragraphs as if fully set forth herein.

19 73. As the result of Defendant's illegal agreements, representations and
 20 omissions of material fact as detailed above, Plaintiffs and Class members paid
 21 money and conferred a benefit upon Defendant that was originally in the Class
 22 members' possession as a result of either fraud, payment under compulsion or
 23 mistake. Defendant received and retained this benefit under such circumstances
 24 that it would be inequitable and unconscionable to permit Defendant to retain this
 25 benefit without returning its reasonable value to Plaintiffs and the Class members.
 26 In fairness, all such monies, including all interest Defendant has earned on such
 27 monies while in wrongful possession thereof, should be paid to members of the
 28 Class.

COUNT VI

**For Violations of Section 17538.9 of California
Business and Professions Code**

80. Plaintiffs repeat and re-allege the allegations set forth in the above paragraphs as if fully set forth herein.

81. Defendant has engaged in unlawful business acts and practices, as set forth in detail above, in connection with its pre-paid calling card business by engaging in conduct in violation of Section 17538.9 of the California Business and Professions Code, which states as follows:

(a) For the purposes of this section:

(1) "Company" refers to any entity providing prepaid calling services to the public using its own or a resold telecommunications network.

(2) "Prepaid calling services" or "services" refers to any prepaid telecommunications service that allows consumers to originate calls through an access number and authorization code, whether manually or electronically dialed.

(3) "Prepaid calling card" or "card" means any object containing an access number and authorization code that enables a consumer to use prepaid calling services. It does not include any object of that type used for promotional purposes.

(4) "Cellular telephone services" means facilities-based, commercial mobile telephone services.

(b) The following standards and requirements for consumer disclosure and services shall apply to the advertising and sale of prepaid calling cards and prepaid calling services:

(1) Any advertisement of the price, rate, or unit value in connection with the sale of prepaid calling cards or services shall include a disclosure of any geographic limitation to the advertised price, rate, or unit value, as well

1 as a disclosure of any additional surcharges, call setup charges, or fees or
2 surcharges applicable to the advertised price, rate, or unit value.

3 (2) The following information shall be legibly printed on the card:

4 (A) The name of the company.

5 (B) A toll-free customer service number.

6 (C) A toll-free network access number, if required to access
7 service.

8 (D) The authorization code, if required to access service.

9 (E) The expiration date or policy, if applicable, except where
10 paragraph (8) applies.

11 (3) The company shall print legibly on the card or packaging, and
12 the vendor shall make available clearly and conspicuously in a prominent
13 area immediately proximate to the point of sale of the prepaid calling card or
14 prepaid calling services the following information:

15 (A) The value of the card and any surcharges, taxes, or fees,
16 including monthly or other periodic fees, maintenance fees, per-call
17 access fees, surcharges for calls made on pay telephones, or
18 surcharges for the first minute or other period of use that may be
19 applicable to the use of the prepaid calling card or prepaid calling
20 services within the United States.

21 (B) Any surcharges for international calls or, in lieu of
22 disclosing each surcharge, the highest surcharge for any international
23 calls applicable on that card and any additional or different prices,
24 rates, or unit values applicable to international usage of the prepaid
25 calling card or prepaid calling services.

26 (C) The minimum charge per call, such as a three-minute
27 minimum charge, if any.

28 (D) The definition of the term "unit," if applicable.

1 (E) The billing decrement.

2 (F) The name of the company.

3 (G) The recharge policy, if any.

4 (H) The refund policy, if any.

5 (I) The expiration policy, if any.

6 (J) The 24-hour customer service toll-free telephone number
7 required in paragraph (6).

8 (4) If a language other than English is used on the card or
9 packaging to provide dialing instructions to place a call or to contact
10 customer service, the information required by paragraph (3) shall also be
11 disclosed in that language in the point of sale disclosure in the manner
12 described in paragraph (3).

13 (5) If a language other than English is used in the advertising or
14 promotion of the card or prepaid calling services or is used on the card or
15 packaging other than for dialing instructions, the information required by
16 paragraph (3) shall also be disclosed in that language on the card or
17 packaging and in the point of sale disclosure in the manner described in
18 paragraph (3).

19 (6) A company shall establish and maintain a toll-free customer
20 service telephone number that shall meet the following requirements:

21 (A) A live operator shall answer incoming calls to the
22 telephone number 24 hours a day, seven days a week.

23 (B) The telephone number shall have sufficient capacity and
24 staffing to accommodate a reasonably anticipated number of calls
25 without incurring a busy signal or undue wait. The company shall
26 provide customer service in each language used on a prepaid calling
27 card or its packaging and in the advertising or promotion of the
28 prepaid calling card or prepaid calling services.

1 (C) The telephone number shall allow consumers to lodge
2 complaints and obtain information on all of the following:

3 (i) All rates, surcharges, and fees.

4 (ii) The company's recharge, refund, and expiration
5 policies.

6 (iii) The balance of use available in the consumer's
7 account, if applicable.

8 (D) A company shall not impose a fee or surcharge related to
9 obtaining customer service, including any charge related to
10 connecting with the customer service number or waiting to speak to a
11 live operator. A company offering prepaid cellular telephone services
12 shall be deemed to be in compliance with the requirements of this
13 paragraph if, when a request for information is made outside of
14 normal business hours, that company provides the information
15 requested on the next business day.

16 (7) A company that issues prepaid calling cards or prepaid calling
17 services shall provide a refund to any purchaser of a prepaid calling card or
18 prepaid calling services if the network services associated with that card or
19 services fail to operate in a commercially reasonable manner. The refund
20 shall be in an amount not less than the value remaining on the card or in the
21 form of a replacement card, and shall be provided to the consumer within 60
22 days from the date of receipt of notification from the consumer that the card
23 has failed to operate in a commercially reasonable manner.

24 (8) Cards without a specific expiration date or policy printed on the
25 card, and with a balance of service remaining, shall be considered active for
26 a minimum of one year from the date of purchase, or if recharged, from the
27 date of the last recharge.

28 ///

1 (9) In the case of prepaid calling cards or services utilized at a pay
2 phone, the company may provide voice prompt notification of any
3 applicable pay phone surcharges, in lieu of providing notice of surcharges as
4 required by paragraph (1) and by subparagraph (A) of paragraph (3),
5 provided that the company provides users of prepaid calling cards or
6 services with reasonable time to terminate the call after notification of
7 applicable pay phone surcharges without incurring any charge for the call.

8 (10) A company shall maintain access numbers with sufficient
9 capacity to accommodate a reasonably anticipated number of calls without
10 incurring a busy signal or undue delay.

11 (11) A company may not impose any fee or surcharge that is not
12 disclosed as required by this section or that exceeds the amount disclosed by
13 the company.

14 (12) A company may not impose any charges if the consumer is not
15 connected to the number called. For the purpose of this paragraph, the
16 customer shall not be considered connected to the number called if the
17 customer receives a busy signal or the call is unanswered.

18 (13) The value of the card and the amount of the various charges,
19 however denominated, that are required to be disclosed by paragraph (3),
20 shall be expressed in the same format. If the value of a card is expressed in
21 minutes, the minutes shall be identified as domestic or international and the
22 identification shall be printed on the same line or next line as the value of the
23 card in minutes.

24 82. Defendant has violated Section 17538.9 of the California Business and
25 Professions Code by engaging in certain prohibited practices, including, *inter alia*:
26 a) misrepresenting the number of minutes of telephone service that a consumer will
27 get from a pre-paid calling card; b) misrepresenting the amount of telephone
28 connection time actually remaining on a calling card when a consumer is using the

1 card; c) concealing when connection fees apply; d) employing misleading
 2 marketing techniques that make it virtually impossible for consumers to compare
 3 the rates and costs of using different pre-paid calling cards; e) misrepresenting the
 4 expiration dates on pre-paid calling cards; f) unfairly preventing customers from
 5 utilizing balances remaining on pre-paid calling cards when such balances are less
 6 than the cost of a phone call including connection fees; and g) failing to adequately
 7 disclose that Defendant charges more for calls involving wireless phones.

8 83. As a result of Defendant's conduct as alleged above, Plaintiffs and
 9 members of the Class have been injured in fact and have lost money or property.
 10 They are thus entitled to the remedies available under the Unfair Competition Law,
 11 including restitution and disgorgement, appropriate preliminary and permanent
 12 injunctive relief and imposition of a constructive trust, and such other and further
 13 relief as the Court may deem proper.

14 COUNT VII

15 *For Violations of the Consumers Legal Remedies Act*

16 84. Plaintiffs repeat and re-allege the allegations set forth in the above
 17 paragraphs as if fully set forth herein.

18 85. This cause of action is brought by Plaintiffs, on behalf of themselves
 19 and the Class, pursuant to Consumers Legal Remedies Act, Cal. Civ. Code §1750,
 20 *et seq.* ("Act").

21 86. The policies, acts and practices described herein were either intended
 22 to or did result in the sale or use of the pre-paid calling cards in question to the
 23 Plaintiffs and the Class members primarily for personal, family, or household use.
 24 Defendant's actions violated and continue to violate the Act in at least the following
 25 respects:

26 87. In violation of Cal. Civ. Code §1770(a)(5), Defendant's acts and
 27 practices constitute representations that the services in question have
 28 characteristics, uses, and benefits which they do not have;

1 88. In violation of Cal. Civ. Code §1770(a)(7), Defendant's acts and
2 practices constitute representations that the services in question are of a particular
3 standard, quality, quantity or grade, when they are of another;

4 89. In violation of Cal. Civ. Code §1770(a)(9), Defendant's acts and
5 practices constitute advertising services with the intent not to sell them as
6 advertised;

7 90. In violation of Cal. Civ. Code §1770(a)(14), Defendant's acts and
8 practices constitute representations that a transaction confers or involves rights,
9 remedies or obligations which it does not have or involve, or which are prohibited
10 by law; and

11 91. In violation of Cal. Civ. Code §1770(a)(16), Defendant's acts and
12 practices constitute a representation that the subject of a transaction has been
13 supplied in accordance with a previous representation when it has not.

14 92. Pursuant to Cal. Civ. Code §1782, Plaintiffs have notified Defendant
15 in writing of the particular violations of Cal. Civ. Code §1770 and demanded that
16 Defendant cure the problems associated with the misrepresentations detailed above,
17 which acts are in violation of Cal. Civ. Code §1770, as to both Plaintiffs and the
18 Class members. Defendant has failed to comply with this written demand.

19 93. As Defendant has failed to fully comply with Plaintiffs' written
20 demand, pursuant to Cal. Civ. Code §1782, Plaintiffs request that the jury award
21 actual, statutory, and/or exemplary damages as appropriate, damages of up to
22 \$5,000 per senior citizen or disabled person, and interest thereon. In addition,
23 Plaintiffs seek and are entitled to, pursuant to Cal. Civ. Code §1780(a)(2), an order
24 enjoining the above-described wrongful acts and practices of Defendant, plus
25 restitution and other equitable monetary relief, costs and attorneys' fees, and any
26 other relief the Court deems proper.

27 ///

28 ///

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request, on behalf of themselves and all members of the Class against Defendant for the injuries sustained by reason of each of the causes of action set forth above, an Order providing as follows, as appropriate for the particular cause of action:

1. An order certifying the Class under Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiffs and their counsel of record to represent the proposed plaintiff Class;

2. Equitable relief enjoining Defendant from engaging in the wrongful conduct complained of herein, requiring Defendant to issue complete and accurate disclosures, requiring restitution and disgorgement of the revenues wrongfully collected thereby and/or imposing a constructive trust on the revenues wrongfully obtained by Defendant, and providing a judicial declaration of the rights and obligations of the parties;

3. An accounting of all monies wrongfully received by Defendant as a result of the conduct complained of herein;

4. Damages in an amount to be determined at trial;

5. Attorneys' fees, disbursements and costs of this action under, *inter alia*, Code of Civil Procedure §1021.5 and Cal. Civ. Code Section 1780; and

6. Such other favorable relief as this Court may deem just, equitable, or proper.

DATED: November 25, 2008

ROSNER & MANSFIELD, LLP

By: S/ Alan M. Mansfield
ALAN M. MANSFIELD
alan@rosnerandmansfield.com

10085 Carroll Canyon Road, First Floor
San Diego, CA 92131
Tel: (858) 348-1005
Fax: (858) 348-1150

JURY DEMAND

Plaintiffs demand a trial by jury of all claims so triable.

DATED: November 25, 2008

ROSNER & MANSFIELD, LLP

By: S/ Alan M. Mansfield
ALAN M. MANSFIELD
alan@rosnerandmansfield.com

Attorneys for Plaintiffs

1 WHATLEY DRAKE & KALLAS, LLC
Edith M. Kallas, Esq.
2 ekallas@wdklaw.com
Joseph P. Guglielmo, Esq.
3 jguglielmo@wdk.com
1540 Broadway, 37th Floor
4 New York, NY 10036
Tel: (212) 447-7070
5 Fax: (212) 447-7077

6 ROSNER & MANSFIELD, LLP
Alan M. Mansfield (SBN 125998)
7 alan@rosnerandmansfield.com
10085 Carroll Canyon Road, Suite 100
8 San Diego, California 92131
Tel: (858) 348-1005
9 Fax: (858) 348-1150

10 Attorneys for Plaintiffs

11 [Additional Counsel Appear on Signature Page]

12

13

UNITED STATES DISTRICT COURT

14

FOR THE CENTRAL DISTRICT OF CALIFORNIA

15

CRESCENCIO GALVEZ, CARMEN
16 ACUNA, and GUADALUPE
GALVEZ, individually and on behalf
17 of all others similarly situated,

17

Plaintiffs,

18

v.

19

20

TOUCH-TEL U.S.A., L.P. dba
TOUCH-TEL USA, LLC,

21

Defendant.

21

22

23

CASE NO. CV 08-05642-RGK (JCx)

CLASS ACTION

DECLARATION OF SERVICE

Person Served: Defendant Touch-Tel
U.S.A., L.P. dba Touch-Tel USA,
LLC

Date Served: November 25, 2008

Courtroom: Hon. R. Gary Klausner

24

25

26

I, the undersigned, declare under penalty of perjury that I am
employed with the law firm of ROSNER & MANSFIELD, LLP, whose address
is 10085 Carroll Canyon Road, Suite 100, San Diego, California 92131. I am
over the age of eighteen years and not a party to this action; that I served the
below named persons the following documents:

26

27

FIRST AMENDED COMPLAINT CLASS ACTION

28

///

- 1 ☐ By personally delivering copies to the person served at the following
address:
2
3 ☒ Via electronic mail to the addresses listed below.
4 ☒ By placing a copy in a separate envelope, with postage fully prepaid, for
each address named below and depositing each for collection and
5 mailing pursuant to the ordinary business practice of this office,
which mail is deposited with the U.S. Postal Service on the same day at
San Diego, California:
6

7 **SEE ATTACHED SERVICE LIST**

- 8
9 ☐ By Overnight Mail by placing an Overnite Express Envelope addressed
to each of the persons on the service list attached hereto and depositing
said envelope in the Express Pickup Boxes located at Business Park
10 Way and Carroll Canyon Road in San Diego, California 92131.

11 Executed this 25th day of November, 2008 at San Diego,
12 California.

13 
14 SALLY CORMIER
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MAIL SERVICE LIST

<p>WHATLEY DRAKE & KALLAS, LLC Edith M. Kallas, Esq. ekallas@wdklaw.com Joseph P. Guglielmo, Esq. jguglielmo@wdk.com 1540 Broadway, 37th Floor New York, NY 10036 Tel: (212) 447-7070 Fax: (212) 447-7077 (VIA E-Mail Only)</p> <p>Co-Counsel for Plaintiffs</p>	<p>WOOD LAW FIRM, LLC E. Kirk Wood (ASB-2937-W55E) ekirkwood1@cs.com 2900 1st Avenue South, Suite A Birmingham, AL 35233 Tel: (205) 612-0243 (VIA E-Mail Only)</p> <p>Co-Counsel for Plaintiffs</p>
<p>LAW OFFICES OF ARCHIE LAMB, LLC Archie Lamb, Jr., Esq. alamb@archielamb.com 2017 Second Avenue North, 2nd Fl. Birmingham, AL 36117 Tel: (205) 324-4644 (VIA E-Mail Only)</p> <p>Co-Counsel for Plaintiffs</p>	<p>LAW OFFICES OF GREG L. DAVIS Greg L. Davis, Esq. gldavis@knology.net 6987 Halcyon Park Drive Montgomery, AL 36117 Tel: (334) 832-9080 (VIA E-Mail Only)</p> <p>Co-Counsel for Plaintiffs</p>
<p>Howard Rubenstein, Esq. Attorney at Law howard@pdq.net 914 Waters Avenue, Suite 20 Aspen, CO 81611 Tel: (832) 715-2788 (VIA E-Mail Only)</p> <p>Co-Counsel for Plaintiffs</p>	<p>LAW OFFICES OF THOMAS D. MAURIELLO Thomas D. Mauriello (SBN: 144811) tomm@maurlaw.com 209 Avenida Fabricante San Clemente, CA 92672 Tel: (949) 542-3555 Fax: (949) 606-9690 (VIA E-Mail Only)</p> <p>Co-Counsel for Plaintiffs</p>
<p>STOKES LAWRENCE P.S. Scott A.W. Johnson, Esq. scott.johnson@stokeslaw.com 800 Fifth Avenue, Suite 4000 Seattle, WA 98104-3179 Tel: (206) 892-2108 Fax: (206) 464-1496 (VIA E-Mail and U.S. Mail)</p> <p>Attorneys for Defendant Touch-Tel U.S.A., L.P. dba Touch-Tel USA, LLC</p>	<p>FREEMAN FREEMAN & SMILEY Curtis Graham, Esq. cag@ffslaw.com 3415 S. Sepulveda Blvd., 12th Fl. Los Angeles, CA 90034 Tel: (310) 255-6153 Fax: (310) 255-6253 (VIA E-Mail and U.S. Mail)</p> <p>Attorneys for Defendant Touch-Tel U.S.A., L.P. dba Touch-Tel USA, LLC</p>